

When is Permission/Consent Needed?

In general, if the FBA focuses on the educational and behavioral needs of a specific child, then the FBA qualifies as an evaluation or reevaluation under Part B and triggers all of the accompanying procedural safeguards, including the need to seek parental consent. The Office of Special Education and Rehabilitative Services (OSERS) states that, as with other individualized evaluation procedures, parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.

Scenario 1: In the case of preparing for a manifestation determination meeting, which may require a FBA as part of the information needed to make the determination, does this require parent notification or permission?

There is no legal requirement to complete an FBA *before* the manifestation review. An FBA is only required when the team determines that the conduct is a manifestation of the student's disability, which then requires the development or revision of the Behavior Intervention Plan (BIP). If the student does not currently have a BIP, an FBA is required prior to creating the BIP. If the student currently has a BIP as part of the IEP, an FBA is not always necessary, as the team may be able to use record review and progress monitoring data to modify it as appropriate. In other words, the FBA comes after the manifestation determination, not before.

The FBA should be treated as an evaluation, which requires informed parental consent first. If parents will not consent in time to use the FBA in the manifestation review, then the review will have to take place without that information. If parents refuse to consent entirely, this relieves the district of the legal obligation to perform the FBA, although the district may use due process to override the non-consent.

Scenario 2: The student is currently on an IEP and has a BIP as part of the IEP. If an additional FBA is needed, does that require parent notification or parent permission?

Consent is needed only if the FBA is an “evaluation.” So, for a BIP that is already developed and part of the IEP, the team can review and modify it as necessary without parental consent. The review can include just a record review and a team conference to discuss it. That process does not require parental consent. Only if you decide that a *new* FBA is needed do you have to obtain parental consent. At a minimum, parents should be informed that the IEP team is reviewing the BIP and making changes and parents should be included in the review process. If the BIP is modified, an IEP amendment must be done to add it to the current IEP.

FBA's and Behavior Plans in Multi-Tiered Systems of Support (MTSS)

Scenario 1: If a student has behaviors of concern but is not currently suspected of having some type of disability, is parent notification or permission required prior to conducting an FBA?

Unless/until the student is suspected of having a disability, the notice obligation is governed by Colorado statutes and, in some cases, by the Protection of Pupil Rights Amendment (PPRA). PPRA (20 U.S.C. § 1232h; 34 CFR Part 98) requires schools to obtain written parental consent before students are required to participate in any survey, analysis, or evaluation that reveals information concerning:

- Political affiliations;
- Mental and psychological problems potentially embarrassing to the student and his/her family;
- Sex behavior and attitudes;
- Illegal, anti-social, self-incriminating and demeaning behavior;
- Critical appraisals of other individuals with whom respondents have close family relationships;
- Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; or
- Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program)

Obviously, the underlined categories above might be involved in anything similar to an FBA, so obtain parental consent prior to conducting an FBA.

Scenario 2: In the MTSS process for either behavior or academics, at what point should parents be notified that child is being considered for this process?

There are two different situations. First, where a child is not suspected of special education eligibility, RtI and the MTSS process are part of regular education and, while evaluative in nature, are part of universal screening. Special education wouldn't come into play until the last tier, and prior to that the interventions are still part of the regular education process.

The second situation is when a student is suspected of having a learning disability and MTSS is going to be used as a part of the eligibility determination process. Then the school must have documentation that the child's parents were notified about the state's policies regarding the amount and nature of student performance data that will be collected and the general education services that would be provided, strategies for increasing the child's rate of learning, and the parents' right to request an evaluation. 34 CFR 300.311 (a)(7).

Observations of Students

When is notification/permission of observation required, especially when it is a school psychologist conducting the observation?

Observation alone does not require parental notice or consent. Observation itself does not constitute an evaluation and can be part of a pre-referral screening or part of the

process of deciding whether to seek permission to perform an evaluation or re-evaluation.

A teacher can contact the school psychologist to come into the classroom and observe a particular student as part of determining whether suspect something is amiss about the child. No notice or consent required for that.

However, if observation is being done as part of an evaluation, parental consent is needed before any part of the evaluation, including observation, is performed.

FBA in Enrich

The FBA form in Enrich is optional and not a state required form. IEP teams may choose to use different FBA formats which they can either ask special education secretaries to send to Mountain BOCES Student Data and Records to attach to the student's file or can summarize in the Evaluation Summary of the Initial Evaluation, Re-eligibility Evaluation, or Special Evaluation paperwork.

The following is guidance if teams choose to use the FBA form in Enrich:

Scenario: When filling out the FBA in Enrich, if an area is indicated as not applicable to the situation and there is a legal dispute with parents, does it create a point of vulnerability? For example, perhaps the duration of the behavior is not a pertinent piece of information, so the team indicates it is not applicable?

The checklist is more of a "safe harbor" than an absolute requirement. That is, if the evaluator shows that each item was addressed, there is more of a presumption that the FBA was done properly.

The purpose of an FBA is to find an explanation of the problem behavior. The assumption is that if the reason the child engages in the behavior is determined, a better intervention plan can be designed that will address it. Conceptually, the evaluator attempts to answer the "why question" by determining what "function" the behavior serves for the child.

If the evaluator is able to provide a convincing analysis of the function the behavior serves for the child, it won't matter legally whether all of the suggested factors have been considered. Another way of saying it is that the factors themselves are not part of the legal requirement. Rather, they comprise a checklist of recommended considerations that should be taken into account when performing the analysis.

In the commentary on the 1999 regulations, the US Department of Education noted that it was not providing a definition of an FBA or prescribing specific content, but essentially said that an FBA has met legal requirements if it helps the IEP team "address the various situational, environmental and behavioral circumstances raised in individual cases" 64 Fed. Reg. 12620 (1999 regulations). The intent is to give latitude and discretion to the evaluator in determining what will help the IEP team provide appropriate interventions for the child.

With all of that said, it is prudent to check off each factor on the list from Enrich, just because you would have less explaining and justification to do later, in the event of a challenge. But it is not a legal requirement.